December 2004

Update: Adoption Proceedings Benchbook

CHAPTER 7

Rehearings, Appeals, Rescissions, and Dissolutions

7.4 Appeals to the Court of Appeals

B. Time Requirements

Effective November 2, 2004, MCR 7.204(A)(1)(c) was amended. The phrase "under the Juvenile Code" was added to the first sentence in order to clarify "that the 14-day time limit for seeking an appeal from an order terminating parental rights or entry of an order denying postjudgment relief from an order terminating parental rights is limited to appeals from orders entered under the Juvenile Code." Staff Comment to Administrative Order 2004-43.

In the May 2004 update, replace the quotation of MCR 7.204(A)(1)(c) with the following:

> "(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights under the Juvenile Code, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or"

November 2004

Update: Adoption Proceedings Benchbook

CHAPTER 2

Freeing a Child for Adoption

2.13 Termination Pursuant to a Step-Parent Adoption

B. Case Law Interpreting MCL 710.51(6)

On page 62 insert the following case summary before the summary of *In re Martyn*:

- ***In re Eickhoff*, ___ Mich App ___ (2004)**

The mother's parental rights were terminated pursuant to MCL 710.51(6). On appeal, the mother claimed that the trial court's finding that she regularly and substantially failed or neglected to visit, contact, or communicate with the child was erroneous because the father prevented her from having regular contact with the child. The Court upheld the termination of parental rights and distinguished this case from *In re ALZ*, 247 Mich App 264 (2001), because in this case the mother had visitation rights ordered in the divorce decree but she did not seek assistance from the Friend of the Court or the divorce court to enforce those rights.

The mother also claimed that the trial court erred by looking at her ability to pay support when the divorce decree indicated that support was "reserved." The Court of Appeals acknowledged that it had previously held that a trial court considering an adoption petition under MCL 710.51(6) cannot look at the parent's ability to pay when a support order exists. However, the Court of Appeals distinguished this case from one in which a parent has been ordered to pay a specific amount, and the trial court ignores that order and relitigates a parent's ability to pay. The Court stated:

> "In reviewing both the statutory language and the pertinent published decisions, we also conclude that the relevant sections of MCL 710.51(6) are essentially yardsticks to be used to measure the noncustodial parent's interest in being a parent as it pertains to permitting termination of his/her parental rights. But, to be an

effective yardstick, the test must measure something; therefore, if an order *reserving or holding in abeyance* the establishment of a sum of money for support is a 'support order' within the meaning of the second clause of subsection 6(a), that measure is meaningless. . . . Thus, we find that the plain language of the provision of the divorce decree in the instant case pertaining to support and the use of common sense require a conclusion that respondent was not ordered to pay child support. Indeed, the court 'reserved' the issue for another time because at the time of the divorce decree respondent was unemployed. Consequently, because the court *did not set forth some sum of money that respondent* was required to pay for child support, there is no support order in place *under the circumstances of this case*, and the trial court properly inquired as to respondent's ability to support her child under the first clause of subsection 6(a)." ___ Mich App at ___. (Emphasis in original.)

CHAPTER 2

Freeing a Child for Adoption

2.16 Special Notice Provisions for Incarcerated Parties

On page 70, at the end of the first paragraph in this section, insert the following text:

MCR 2.004(A) states that it applies to one of the specifically enumerated actions "in which a party is incarcerated under the jurisdiction of the Department of Corrections." In *In re Davis*, ___ Mich App ___, ___ (2004), the Court indicated that "Department of Corrections" refers only to the Michigan Department of Corrections. Therefore, MCR 2.004 does not apply to parties incarcerated in another state who are not subject to the jurisdiction of the Michigan Department of Corrections.

August 2004

Update: Adoption Proceedings Benchbook

CHAPTER 10

Paying the Costs of Foster Care and Adoption

10.5 Adoption Subsidies

A. Support Subsidies

Effective July 8, 2004, MCL 400.115f* was amended. Although the definition of "support subsidy" did not change, a new subsection was added to MCL 400.115f that changes the citation for the definition of "support subsidy." In the first paragraph on page 281, change the citation for the definition of a "support subsidy" to MCL 400.115f(v).

*See 2004 PA 193.

1. Requirements

Effective July 8, 2004, MCL 400.115g* was amended to change the requirements for the FIA certification of an adoptee for subsidies. MCL 400.115g(1)(a) no longer requires the FIA to certify that the adoptive parent has requested a support subsidy or that the adoptee is in foster care at the time the FIA certifies the support subsidy. Therefore, on page 281, replace the quote of MCL 400.115g(1) with the following text:

*See 2004 PA 193.

> "(1) The [FIA] may pay a support subsidy to an adoptive parent of an adoptee who is placed in the home of the adoptive parent under the adoption code or under the adoption laws of another state or a tribal government, if all of the following requirements are met:
>
> > "(a) The [FIA] has certified that the adoptee is a child with special needs.
> >
> > "(b) Certification is made before the adoptee's eighteenth birthday.
> >
> > "(c) Certification is made before the petition for adoption is filed.

> "(d) The adoptive parent requests the support subsidy not later than the date of confirmation of the adoption."

*Effective July 8, 2004.

2004 PA 193* amended the definition of "child with special needs" in MCL 400.115f(h). Previously, MCL 400.115f(h)(*i*) required the state to make several determinations. MCL 400.115f(h)(*i*) now requires a specific judicial finding that the child cannot or should not be returned to the home of the child's parents. Near the bottom of page 281 and continuing on the top of 282, replace the quote of MCL 400.115f(h)(*i*)–(*iii*) with the following quote:

> "(*i*) There is a specific judicial finding that the child cannot or should not be returned to the home of the child's parents.
>
> "(*ii*) A specific factor or condition, or a combination of factors and conditions, exists with respect to the child so that it is reasonable to conclude that the child cannot be placed with an adoptive parent without providing adoption assistance under this act. The factors or conditions to be considered may include ethnic or family background, age, membership in a minority or sibling group, medical condition, physical, mental, or emotional disability, or length of time the child has been waiting for an adoptive home.
>
> "(*iii*) A reasonable but unsuccessful effort was made to place the adoptee with an appropriate adoptive parent without providing adoption assistance under this act or a prospective placement is the only placement in the best interest of the child."

2004 PA 193 eliminated the requirement in MCL 400.115g(1)(a)(*iii*) that the FIA certify that the adoptee was in foster care at the time the FIA certified the support subsidy. Therefore, delete the first full paragraph before the "**Note**" on page 282.

May 2004

Update: Adoption Proceedings Benchbook

CHAPTER 3

Identifying the Father

3.10 Putative Father Hearing — Child Protective Proceedings

Insert the following text on the bottom of page 120 and delete the case summary of *In re Montgomery* on pages 120-121:

The Supreme Court held that the Michigan Court Rules do not permit a biological father to participate in a child protective proceeding where a legal father exists. *In re KH,* ___ Mich ___, ___ (2004), overruling *In re Montgomery*, 185 Mich App 341 (1990). In *KH*, the FIA filed a petition to terminate the parental rights of Tina and Richard Jefferson to four children. During a bench trial, the parties testified that Tina and Richard were legally married during each child's conception and birth and were still married at the time of trial. Based on DNA test results admitted at trial, the referee determined that another man, Lagrone, was the biological father of three of the children. *KH, supra* at ___. Lagrone then filed a motion seeking a ruling that Richard Jefferson was not the father of the three children. Tina objected to the motion, arguing that as a putative father Lagrone did not have standing to establish paternity in the child protective proceeding. The trial court granted Lagrone's motion to establish paternity. The children's lawyer-guardian ad litem appealed. *KH, supra* at ___.

MCR 5.921(D)* permitted a putative father to be identified and given notice of court hearings only where the minor child had no father. Therefore, if a father already existed pursuant to MCR 5.903(A)(4), a putative father could not be identified or given notice. *KH, supra* at ___.

*Now MCR 3.921(C). Although *KH* was decided under the court rules in effect prior to May 1, 2003, the Court notes that the analysis and outcome of the case are the same under the current court rules. *KH, supra* at ___, n 1.

Because Tina and Richard were legally married at the time of each minor's conception and birth, the children had a legal father and no other man could be identified as a putative father unless the minors were determined to be "born out of wedlock." MCR 5.903(A)(1)* defined a "child born out of wedlock" as a child "conceived and born to a woman who is unmarried from the conception to the birth of the child, or a child determined by judicial notice or otherwise to have been conceived or born during a marriage but who is not the issue of that marriage." *KH, supra* at ___.

*The definition of "child born out of wedlock" was incorporated into the definition of "father" in MCR 3.903(A)(7)(a).

Lagrone argued that the three children were judicially determined to be "born out of wedlock" when the referee determined that Lagrone was the biological father of the children. The Court looked to the Paternity Act as the legislatively provided mechanism for establishing paternity. The Court concluded:

> "[A] determination that a child is born out of wedlock must be made by the court before a biological father may be identified in a child protective proceeding.
>
> "Under either version of the court rule, MCR 5.921(D) or MCR 3.921(C), a prior out-of-wedlock determination does not confer *any type* of standing on a putative father. Rather, the rules give the trial court the discretion to provide notice to a putative father, and permit him to establish that he is the biological father by a preponderance of the evidence. Once proved, the biological father is provided fourteen days to establish a legally recognized paternal relationship.
>
> "*Nothing in the prior or amended court rules permits a paternity determination to be made in the midst of a child protective proceeding.* Rather, once a putative father is identified in accordance with the court rules, the impetus is clearly placed on the putative father to secure his legal relationship with the child as provided by law. If the legal relationship is not established, a biological father may not be named as a respondent on a

> termination petition, the genetic relationship notwithstanding." [Emphasis added.] *KH, supra* at ___.

In *KH,* the record contained evidence that the presumption of legitimacy had been rebutted. During the course of the proceedings, Tina and Richard testified that Richard Jefferson was not the children's father. Richard also testified that he did not wish to participate in the proceedings, which, the Court concluded, could reasonably be construed as an indication that Richard was prepared to renounce the benefit afforded to him by the presumption of legitimacy and to not claim the children as his own. *KH, supra* at ___. However, since the trial court did not make a finding on whether the presumption of legitimacy was rebutted, the Court remanded to the trial court for such a determination. The Court concluded:

> "If Mr. Lagrone had been . . . identified[as the putative father], and elected to establish paternity as permitted by MCR 5.921(D)(2)(b), the out-of-wedlock determination made in the child protective proceeding could serve as the prior determination needed to pursue a claim under the Paternity Act. *Girard* [*v Wagenmaker*, 437 Mich 231 (1991)].
>
> "Accordingly, this case is remanded to the trial court for such a determination. If the court finds that the presumption of legitimacy was rebutted by clear and convincing evidence from either parent that the children are not the issue of the marriage, the court may take further action in accordance with MCR 5.921(D)." *KH, supra* at ___.

CHAPTER 4

Jurisdiction, Venue, and Petition Requirements

4.2 Venue

Effective April 20, 2004, 2004 PA 68 amended MCL 710.23d. In the last paragraph on page 125 and continuing on page 126, replace the sentence beginning, "If a temporary placement" with the following text:

If a temporary placement of the child has already occurred, venue is proper in the county where the child's parent, the child's guardian, or the prospective adoptive parent resides, or where the child is found. MCL 710.24(1) and 710.23d(2).

CHAPTER 4

Jurisdiction, Venue, and Petition Requirements

4.6 Petition Requirements

D. Filing and Notice Requirements

Effective April 20, 2004, 2004 PA 68 amended MCL 710.23d. On page 140, in the first paragraph of this subsection replace the second sentence with the following text:

If a temporary placement of the child has already occurred, venue is proper in the county where the child's parent, the child's guardian, or the prospective adoptive parent resides, or where the child is found. MCL 710.24(1) and 710.23d(2).

CHAPTER 5

Temporary Placements, Investigation Reports, and the Safe Delivery of Newborns

5.1 Temporary Placements

C. Procedural and Documentary Requirements

Effective April 20, 2004, 2004 PA 68 amended MCL 710.23d to eliminate the requirement that a child who is temporarily placed must be placed with a Michigan resident. On page 156, replace the first paragraph in subsection (C) with the following:

*See Section 5.2 for information on preplacement assessments.

A prospective adoptive parent with whom a child is temporarily placed must have had a preplacement assessment completed within one year prior to the date of transfer with a finding that the prospective adoptive parent is suitable to be a parent of an adoptee.* MCL 710.23d(1)(a).

1. Statement of Transfer by Parent, Guardian, or Representative of Child Placing Agency

MCL 710.23d(1)(c)(*ii*) was also amended by 2004 PA 68. In the middle of page 156, delete the phrase "who is a Michigan resident" from the end of the paragraph beginning (ii).

2. Statement of Transfer by the Prospective Adoptive Parent

On page 157, replace the last sentence of the first paragraph in this subsection and the quotation that follows with the following language:

Pursuant to MCL 710.23d(1)(d)(i)–(iv), the statement must also contain an attestation by the adoptive parent to all of the following:

> "(*i*) That the prospective adoptive parent understands that the temporary placement will not become a formal placement until the parents consent or release their parental rights and the court orders the termination of parental rights and approves the placement and that the prospective adoptive parent must relinquish custody of the child within 24 hours after being served with an order under [MCL 710.23e(2)].
>
> "(*ii*) That, if the prospective adoptive parent is a Michigan resident, the prospective adoptive parent agrees to reside with the child in Michigan until formal placement occurs.

> "(*iii*) That the prospective adoptive parent agrees to obtain approval in compliance with the interstate compact on the placement of children, 1984 PA 114, MCL 3.711 to 3.717, before the child is sent, brought, or caused to be sent or brought into a receiving state as that term is defined in section 1 of the interstate compact on the placement of children, 1984 PA 114, MCL 3.711.*
>
> "(*iv*) That the prospective adoptive parent submits to this state's jurisdiction."

*See Section 4.4 for information on the Interstate Compact on the Placement of Children.

3. Transfer Report

On the bottom of page 157, replace the quoted paragraph with the following quote:

> "Not later than 2 days, excluding weekends and holidays, after a transfer of physical custody of a child in accordance with [MCL 710.23d(1)], the adoption attorney or child placing agency who assists with the temporary placement or the child placing agency that makes the temporary placement shall submit to the court in the county in which the child's parent or guardian or the prospective adoptive parent resides, or in which the child is found, a report that contains all of the following:

5. Disposition Report

At the top of page 159, replace the margin note with the following:

Effective April 20, 2004, 2004 PA 68 amended MCL 710.23d(2). The court that received the report in subsection (2) is the court located in the county where the child's parent, the child's guardian, or the prospective adoptive parent resides, or where the child is found. MCL 710.24(1) and 710.23d(2).

CHAPTER 5

Temporary Placements, Investigation Reports, and the Safe Delivery of Newborns

5.4 Resolving Custody Disputes After a Temporary Placement

Effective April 20, 2004, 2004 PA 68 amended MCL 710.23d(2). Replace the first sentence of the first margin note on page 167 with the following text:

The report of transfer of physical custody is filed in the court located in the county where the child's parent, the child's guardian, or the prospective adoptive parent resides, or where the child is found. MCL 710.24(1) and 710.23d(2).

A. Petition for Disposition or Revocation of a Temporary Placement

1. Parent or Guardian

Effective April 20, 2004, 2004 PA 68 amended MCL 710.23d(2). On page 167, replace the second sentence of the second margin note with the following text:

It is filed in the court located in the county where the child's parent, the child's guardian, or the prospective adoptive parent resides, or where the child is found. MCL 710.24(1) and 710.23d(2).

CHAPTER 7

Rehearings, Appeals, Rescissions, and Dissolutions

7.4 Appeals to the Court of Appeals

B. Time Requirements

Effective May 1, 2004 MCR 7.204(A)(1) was amended. On the bottom of page 227 and top of page 228, replace the quotation of MCR 7.204(A)(1) with the following quote:

"(1) An appeal of right in a civil action must be taken within

(a) 21 days after entry of the judgment or order appealed from;

(b) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other postjudgment relief, if the motion was filed within the initial 21-day appeal period or within further time the trial court may have allowed during that 21-day period;

(c) 14 days after entry of an order of the family division of the circuit court terminating parental rights, or entry of an order denying a motion for new trial, rehearing, reconsideration, or other postjudgment relief from an order terminating parental rights, if the motion was filed within the initial 14-day appeal period or within further time the trial court may have allowed during that period; or

(d) another time provided by law.

"If a party in a civil action is entitled to the appointment of an attorney and requests the appointment within 14 days after the final judgment or order, the 14-day period for the taking of an appeal or the filing of a postjudgment motion begins to run from the entry of an order appointing or denying the appointment of an attorney. If a timely postjudgment motion is filed before a request for appellate counsel, the party may request counsel within 14 days after the decision on the motion."

CHAPTER 10

Paying the Costs of Foster Care and Adoption

10.5 Adoption Subsidies

C. Nonrecurring Adoption Expenses

2004 PA 193* amended the definition of "child with special needs" in MCL 400.115f(h). Previously, MCL 400.115f(h)(*i*) required the state to make several determinations. MCL 400.115f(h)(*i*) now requires a specific judicial finding that the child cannot or should not be returned to the home of the child's parents. On page 287, replace the quote of MCL 400.115f(h)(*i*)–(*iii*) with the following quote:

*Effective July 8, 2004.

> "(*i*) There is a specific judicial finding that the child cannot or should not be returned to the home of the child's parents.
>
> "(*ii*) A specific factor or condition, or a combination of factors and conditions, exists with respect to the child so that it is reasonable to conclude that the child cannot be placed with an adoptive parent without providing adoption assistance under this act. The factors or conditions to be considered may include ethnic or family background, age, membership in a minority or sibling group, medical condition, physical, mental, or emotional disability, or length of time the child has been waiting for an adoptive home.
>
> "(*iii*) A reasonable but unsuccessful effort was made to place the adoptee with an appropriate adoptive parent without providing adoption assistance under this act or a prospective placement is the only placement in the best interest of the child."

April 2004

Update: Adoption Proceedings Benchbook

CHAPTER 2

Freeing a Child for Adoption

2.13 Termination Pursuant to a Step-Parent Adoption

C. Grandparent Visitation

Insert the following text on page 65, immediately before Section 2.14:

In *Johnson v White*, ___ Mich App ___, ___ (2004), the Court of Appeals held that the decision in *DeRose v DeRose*, 249 Mich App 388 (2002), which found MCL 722.27b unconstitutional, should be retroactively applied. In *Johnson,* the defendant moved his children to another state in violation of the trial court's grandparent visitation order. ___ Mich App at ___. The lower court found the defendant in contempt* of court for failing to comply with the court's grandparent visitation order. The defendant argued that the order was void *ab initio* because the court's order was entered pursuant to MCL 722.27b, which was found unconstitutional in *DeRose, supra*. The Court of Appeals stated:

> "[W]e find that the *DeRose* decision clearly established a new principle of law by addressing for the first time the constitutionality of MCL 722.27b and declaring the statute unconstitutional. We also find that the purpose of the *DeRose* decision would best be served by giving it full retroactive application.
>
> . . .
>
> "[T]he effect of *DeRose* being given full retroactive application is only to terminate those [grandparent] visitation rights. And so we hold that the *DeRose* decision should be applied retroactively. Accordingly, we vacate the trial court's . . . order granting plaintiffs grandparenting time as it is void *ab initio.*" ___ Mich App at ____. (Internal citations omitted.)

*For a discussion of the Court's contempt holding, see the April 2004 update to the *Contempt of Court Benchbook (Revised Edition)* (MJI, 2000).

CHAPTER 6

Formal Placement and Action on the Adoption Petition

6.7 Grandparent Visitation

Insert the following text on page 207, immediately before Section 6.8:

In *Johnson v White*, ___ Mich App ___, ___ (2004), the Court of Appeals held that the decision in *DeRose v DeRose*, 249 Mich App 388 (2002), which found MCL 722.27b unconstitutional, should be retroactively applied. In *Johnson,* the defendant moved his children to another state in violation of the trial court's grandparent visitation order. The lower court found the defendant in contempt* of court for failing to comply with the court's grandparent visitation order. The defendant argued that the order was void *ab initio* because the court's grandparent visitation order was entered pursuant to MCL 722.27b, which was found unconstitutional in *DeRose, supra*. ___ Mich App at ___. The Court of Appeals stated:

*For a discussion of the Court's contempt holding, see the April 2004 update to the *Contempt of Court Benchbook (Revised Edition)* (MJI, 2000).

> "[W]e find that the *DeRose* decision clearly established a new principle of law by addressing for the first time the constitutionality of MCL 722.27b and declaring the statute unconstitutional. We also find that the purpose of the *DeRose* decision would best be served by giving it full retroactive application.
>
> . . .
>
> "[T]he effect of *DeRose* being given full retroactive application is only to terminate those [grandparent] visitation rights. And so we hold that the *DeRose* decision should be applied retroactively. Accordingly, we vacate the trial court's . . . order granting plaintiffs grandparenting time as it is void *ab initio.*" ___ Mich App at ____. (Internal citations omitted.)